IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1026 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

PARMAR VIHAJI SARDULJI

Appearance:

1. Criminal Appeal No. 1026 of 1988
MR B.D. DESAI APP for appellant
MR BN PATEL for Respondent No. 1

CORAM : MR.JUSTICE A.M.KAPADIA
and
MR.JUSTICE H.H.MEHTA

Date of decision: 28/01/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE A.M.KAPADIA)

1. By means of filing this Criminal Appeal under Section 378 of the Code of Criminal Procedure, 1973 ('the Code' for short), appellant - State of Gujarat has questioned legality and validity of the judgment and order dated September 14, 1988 rendered by learned Additional Sessions Judge, Banaskantha at Palanpur in Sessions Case No.45 of 1988 acquitting respondent/accused of the offence under Section 17 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act' for short).

2. The prosecution case, in brief, is that:

(i) A.I. Patel, the then PSI of Tharad Police Station received secret information that one Rajput Vihaji Sardulji, resident of Suigam, was doing illegal business of sale of opium by keeping it in his pan-beedi shop (galla) on National Highway at Tharad. Therefore he had called two persons to act as panchas and they were informed accordingly. Thereafter keeping both the panchas together with the members of the staff, i.e., Police Constable Natwarlal Amulakh, Police Constable Bhikhankhan Gulamkhan and Police Constable Kantilal Punjabhai they started for going to National Highway at Tharad in a police jeep.

(ii) On reaching near the Pan-beedi shop of the respondent/accused, he tired to run away and therefore he was caught hold and in the presence of two panchas his pan-beedi shop was searched but no contraband article was found in the shop. Thereafter the person of the respondent/accused was searched and in the search from the cloth which he had put on, near the waist, two balls (batti) of opium wrapped in a plastic paper admeasuring 45 grams were found. On inquiry about the pass/permit, it was revealed that he was not having any pass/permit for keeping opium with him. Therefore, said two balls (batti) were wrapped in a cloth and the signatures of the panchas were taken on the slip which was affixed on that cloth and thereafter seal of PSI Tharad was affixed. A panchnama was drawn at the place where person of the respondent/accused was searched and opium was found. The respondent/accused was arrested and case was registered against him for the offence under Section 66 (a) of the Bombay Prohibition Act and Section 15 of the NDPS Act. Muddamal was sent to Forensic Science Laboratory for analysis and report.

(iii) Pursuant to the registration of the case, investigation was put into motion and during the investigation statements of witnesses were recorded. At the conclusion of the investigation evidence was divulged against the respondent/accused and he was charge-sheeted. On committal he was tried by the learned Additional Sessions Judge, Banaskantha at Palanpur in Sessions Case No.45 of 1988.

(iv) We may incidentally mention that though initially offence came to be registered under Section 66 (A) of the Bombay Prohibition Act as well as section 15 of the NDPS Act, the investigating officer has filed charge-sheet for commission of an offence under Section 17 of the NDPS Act and not under the Bombay Prohibition Act in the Court of learned Judicial Magistrate, First Class, Sihori. The investigating officer ought to have filed charge-sheet straightway before the Sessions Court. However, wrong practice was adopted by the concerned police station but it has no bearing with the disposal of this appeal. The fact remains that the accused was committed to the Sessions Court and on committal the learned trial judge framed charge against the respondent/accused at Ex.3 to which he pleaded not guilty and claimed to be tried.

(v) To prove the culpability of the accused, the prosecution has examined as many as 10 witnesses and also produced several documents upon which they also placed heavy reliance.

(vi) The learned trial Judge recorded statement of the respondent/accused under section 313 of the Code after recording of the evidence of the prosecution witnesses was over wherein also he denied the prosecution case in toto as false complaint is filed against him.

(v) On appreciation and evaluation of the evidence led by the prosecution, the learned trial Judge has disbelieved the case of the prosecution on the premise that both the panchas have not supported the prosecution case and there are several infirmities in the investigation and therefore acquitted the respondent/accused by the impugned judgment and order which has given rise to the present appeal.

3. Mr. B.D. Desai, learned APP for the appellant State of Gujarat has taken us through the entire collection of the evidence on record. He submitted that while acquitting the respondent/accused the learned trial Judge has given undue weightage to the evidence of panch

witnesses. It is also asserted by him that there is ample evidence on record that the respondent/accused was found with 45 grams of opium which has been proved by the evidence of the members of the raiding party. However, the learned trial Judge has wrongly discarded the said piece of evidence which has resulted into miscarriage of justice. It is also emphasised by the learned APP that offence under NDPS Act is an offence against the society and the offender is a menace to the society. Therefore there is no reason to disbelieve the evidence of the members of the raiding party and hence the judgment and order which is impugned in this appeal deserves to be quashed and set aside by holding the respondent/accused guilty of the said offence. Therefore this appeal is deserved to be allowed by reconsidering the whole matter by this Court.

4. Mr. B.N. Patel, learned advocate for the respondent/accused supported the impugned judgment and order throughout. According to him, no infirmity is found in the judgment rendered by the learned trial judge as he has given cogent reason for acquitting the respondent/accused. He has also asserted that this is an acquittal appeal and therefore this Court may not interfere with the order of acquittal recorded by the learned trial Judge. It is decided by catena of decisions that unless the findings recorded by the trial court are found to be perverse or contrary to the evidence on record this court may not substitute its finding merely because another contrary view is possible and in the facts and circumstances, according to him, even another contrary view is not possible. He therefore urged that the appeal lacks merit and deserves to be dismissed and prayed that the same may be dismissed.

5. We have considered the submissions advanced by Mr. Desai, learned APP for the appellant- State of Gujarat and Mr. Patel, learned advocate for the respondent/accused. We have also perused the averments made in the memo of appeal, grounds mentioned therein and the impugned judgment and order recorded by the learned trial Judge acquitting the respondent/accused of the offence with which he was charged. We have also perused the entire collection of the evidence and the record and proceedings of the trial court.

6. In our considered view, there is no substance in any of the contentions raised by Mr. Desai, learned APP for the appellant - State. According to us, except the evidence of the police officers themselves who were members of the raiding party, no corroborative evidence

is led by the prosecution to establish that contraband article - opium was found from the respondent/accused. Panch witness (P.W.2) Devuji Joruji, interalia in his deposition testified at Ex.7 that he did not remember who was the second panch. He was called by the police at the police station and told to put his signature. According to him he has never gone to the place of incidence. He did not know the accused. Similarly second Panch witness (P.W.3), Jehuji Ranchhodji, whose evidence was recorded at Ex.9 has also stated similar version which was stated by panch witness Devuji at Ex.7. The prosecution has therefore sought permission to cross-examine both the panchas by declaring them hostile. Permission sought for was granted and both of them were cross-examined by the prosecution. During their cross-examination also they stuck to the similar version which they have stated in the examination-in-chief. The sum and substance of the evidence of the panch witnesses is that no contraband article - opium was recovered from the respondent/accused neither they had seen the accused nor they had gone to the place of the accused alongwith the members of the raiding party.

7. So far as the remaining witnesses are concerned, they are members of the raiding party. Obviously therefore they have supported the prosecution case. It cannot be laid down as an absolute proposition of law that the evidence of members of raiding party cannot be relied upon and cannot be made a basis for conviction. However, their evidence is required to be scrutinised with great care and circumspection in light of other evidence adduced and produced by the prosecution.

8. As observed hereinabove, both the panch witnesses have not supported the prosecution version. Therefore their evidence is required to be appreciated cautiously and carefully.

9. It is a cardinal principle of criminal jurisprudence that to prove the culpability of the accused under NDPS Act statutory provisions contained in Sections 42 and 50 of the NDPS Act which are mandatory in nature must be complied with. We have noticed that the prosecution has not led evidence in this regard nor the learned trial Judge has made any mention about it. On having perusal of the complaint and panchnama also we could notice that the statuary provisions contained in sections 42 and 50 of the NDPS Act have not been complied with in this case.

10. As regards provisions of section 42 of the NDPS

Act are concerned, the police officer on receipt of information given by any person or from his personal knowledge that any narcotic drug, or psychotropic substance, or contraband substance in respect of which an offence punishable under Chapter IV of the NDPS Act has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed in any building, conveyance or enclosed place, the same must be taken down in writing. So far as the instant case is concerned, it has come in evidence that the PSI of Tharad Police station received secret information but he has not taken down the same in writing in station diary. Therefore, undisputedly the statutory provision contained in section 42 of the NDPS Act has not been complied with.

11. Besides this, statutory provision contained in section 50 of the NDPS Act has also not been complied with when the contraband article i.e., two balls of opium was recovered from the person of the respondent/accused even though there was prior information and therefore the PSI Patel ought to have informed the respondent/accused about the requirement of Section 50 of the NDPS Act.

12. It has come in evidence that the PSI has not made report of the arrest of the accused and seizure of the contraband article opium within 48 hours to his immediate official superior as envisaged under section 57 of the NDPS Act. We are conscious about the law that the requirement of section 57 of the NDPS Act is not mandatory but directory. However, having regard to the circumstances about which we have made reference earlier since in this case the concerned PSI has failed to make report as envisaged under Section 57 of the NDPS Act, the entire prosecution case has become doubtful.

13. In the case of State of Punjab v. Balbirsingh, (1994) 3 SCC 299 the Supreme Court held that noncompliance of statutory requirements of Sections 42 (1), 42 (2) and provisions of Sections 52, 55 and 57 of the NDPS Act is fatal to the prosecution case. This principle is reiterated by the Supreme Court in the case of Mohinder Kumar v. State, Panaji, Goa (1998) 8 SCC 655. Applying the principle laid down by the Supreme Court in the above referred to judgments to the facts of the present case, at the risk of repetition, we may state that PSI, Tharad has violated all the statutory provisions contained in the NDPS Act and therefore the entire prosecution case has become doubtful.

14. Seen in the above context, we are of the

considered opinion that the learned trial judge has rightly considered the evidence and reached to the just and correct conclusion which does not warrant any interference of this court. On the contrary it requires affirmation when we are in full agreement with the reasoning and conclusion arrived at by the learned trial judge.

15. This is an acquittal appeal in which the appellate court would be slow to interfere with the order of acquittal. Infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such a case, it would not be safe to set aside the order of acquittal, more particularly when the evidence has not inspired confidence of the learned Judge who had the opportunity to observe demeanour of the witnesses. As we are in general agreement with the view expressed by the learned Judge, we do not think it necessary either to reiterate the evidence of prosecution witnesses or to restate the reasons for acquittal given by the trial Court. On overall appreciation of evidence, we are satisfied that there is no infirmity in the reasons assigned by the learned Judge for acquitting the respondent/accused. Suffice it to say that the learned Judge has given cogent and convincing reasons for acquitting the respondent/accused and the learned APP has failed to dislodge the reasons given by the learned Judge in order to convince us to take the view contrary to the one already taken by the learned Judge. Therefore, the acquittal appeal deserves to be dismissed.

16. For the foregoing reasons, we do not find any substance in this appeal. The appeal, therefore, fails and is accordingly dismissed. The respondent/accused is on bail. Therefore, his bail bonds shall stand cancelled and sureties are discharged.

(A.M. Kapadia, J.)

(H.H. Mehta, J.)
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